Supreme Court, U.S.
FILED
JUN 10 2003
OFFICE OF THE CLERK

(8)

No. 02-1411

IN THE

Supreme Court of the United States

THE BOEING COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA *EX REL.* BRETT ROBY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY TO RESPONDENT BRETT ROBY'S OBJECTION TO THE MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JAMES J. GALLAGHER*
HERBERT L. FENSTER
BARBARA J. BACON
MCKENNA LONG & ALDRIDGE LLP
444 S. Flower Street, Suite 800
Los Angeles, CA 90071
(213) 688-1000

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for *Amicus Curiae*
Chamber of Commerce of the
United States of America

**Counsel of Record*

6 pp

I. INTRODUCTION

Respondent Brett Roby's objections to the Chamber of Commerce of the United States of America's ("the Chamber's") participation in this case are unfounded. The motion of the Chamber for leave to file a brief as *amicus curiae* should, therefore, be granted.

First, Respondent Roby argues that the Chamber either repeats Boeing's arguments or raises issues that are irrelevant to the case. The Chamber does not dispute that an *amicus curiae* ordinarily may not introduce issues that were not raised by the parties. An *amicus* may, however, address new matter that is relevant to the issues already before this Court. That is precisely what the Chamber seeks to do in this case. The Chamber's brief addresses the second issue in Boeing's petition, namely, "[w]hether the court below erred in holding . . . that damages recoverable under the False Claims Act, before trebling, are not limited 'to the amount wrongfully paid to satisfy the false claim.'" Boeing's Petition at i. The Chamber augments the arguments of Boeing by citing new authorities, elaborating on others and presenting a new perspective on the amount that was wrongfully paid to satisfy the alleged false claim in this case. In addition, as the voice of a multitude of American businesses, the Chamber shows that the issues addressed in Boeing's petition for certiorari transcend the parties.

Second, Respondent Roby seeks to challenge the Chamber's participation by smearing the Aerospace Industries Association of America ("AIA"), distorting the record of AIA's participation in this case, and trying to convince this Court that AIA and the Chamber are essentially the same organization, a suggestion that is ludicrous on its face. AIA is a trade association with approximately 75 members in a single industry. The Chamber is the world's largest business federation, representing more than 3 million businesses and business organizations of every size, industrial sector, and geographic region. Although the interests of

the Chamber and AIA sometimes coincide, the two organizations often have different agendas. Indeed, when the AIA submitted *amicus* briefs below, it addressed both the High Value Items Clause and the measure of damages issues, but focused mainly on the High Value Items Clause because that issue was extremely important to AIA's members. In contrast, the Chamber declined to participate below and now addresses only the broader, measure of damages issue, which is more important to the Chamber's members than is the High Value Items Clause issue.

Finally, the facts that the Chamber is represented by the same counsel that represented AIA below and raised some of the same arguments raised by AIA are irrelevant to whether the Chamber is a proper *amicus* party. Neither AIA nor Boeing participated in the Chamber's decision to submit this brief or provided any financial or editorial assistance in its preparation.

II. THE ROLE OF AN *AMICUS CURIAE* IS TO AUGMENT THE ARGUMENTS RAISED BY THE PARTIES AS THE CHAMBER HAS DONE IN THIS CASE.

Rule 37.1 of this Court provides that "[a]n *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court." Consequently, it was proper for the Chamber to address new matter and to bring a new perspective on the issue of damages that was raised in Boeing's petition. The fact that the Chamber posits a new legal theory on the method of calculating damages that was not raised by Boeing is of no moment. This Court has previously addressed arguments raised by an *amicus* even if not raised by the parties. *See, e.g.*, *White v. Illinois*, 502 U.S. 346, 352 (1992) ("We consider as a preliminary matter an argument not considered below but urged by the United States as *amicus curiae* in support of respondent"). Indeed, "[w]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper

construction of governing law." *Kamen v. Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991). Thus, the Chamber seeks only to fill the role of an *amicus* by addressing matters that will help the Court to properly dispose of the issues raised in this case.

III. THE CHAMBER IS AN APPROPRIATE *AMICUS CURIAE*.

The fact that the Chamber is represented by counsel who represented AIA below does not make the Chamber's brief improper. Nothing in this Court's rules prevents an *amicus* from retaining counsel who has represented another party on the same issue below. Indeed, *amici* often find it advantageous to retain counsel who are already familiar with the facts and law involved in the case.

Similarly, the fact that the Chamber makes some of the same arguments that were made by AIA below does not make the Chamber's brief improper. Nevertheless, the Chamber's brief does not merely repeat AIA's arguments. First, AIA focused on the High Value Items Clause whereas the Chamber addresses only the measure of damages under the False Claims Act. Second, while the Chamber cites many of the authorities cited by AIA in its damages argument, the Chamber cites additional authorities as well. For example, AIA did not rely on *Cook County, Ill. v. United States ex rel. Chandler*, 123 S. Ct. 1239 (2003); 1 J. White & R. Summers, *Uniform Commercial Code*, § 10.4 (4th ed. 1995); *Black's Law Dictionary* (7th ed. 1999); or the *Restatement (Second) of Torts* (1976). These authorities are, however, an integral part of the Chamber's brief.

Likewise, the fact that the *en banc* Sixth Circuit rejected AIA's *amicus* brief is irrelevant to whether this Court should accept the Chamber's *amicus* brief. First, the *en banc* Sixth Circuit provided no rationale when it denied AIA's motion. Thus, it is mere speculation on Respondent

Roby's part as to why AIA's motion was denied.[1] Indeed, according to AIA, and contrary to Respondent Roby's contentions, "AIA is not the 'alter ego' of The Boeing Company; AIA made an independent determination that it was important to the collective interest of all of AIA's members to file *amicus* papers on the issues raised in [the Sixth Circuit]; [and] Boeing did not 'guarantee' payment of AIA's legal expenses below . . ." Reply to Roby's Opposition to the Motion by AIA for Leave to File a Brief as *Amicus Curiae* in Support of The Boeing Company's Petition for Rehearing and Suggestion for Rehearing En Banc (dated November 11, 2002) at 1. Rather, nine AIA member companies, other than Boeing, financed the brief. *Id.* at 4 n.4. Second, regardless of the Sixth Circuit's rationale for rejecting AIA's motion for leave to file an *amicus* brief in support of Boeing's petition for rehearing, the Sixth Circuit's ruling is not binding on this Court. Third, and more importantly, it is the Chamber, not AIA, that seeks to file an *amicus* brief in this Court. Thus, Roby's arguments about AIA are a red herring.

Turning to the Chamber, the Chamber is an appropriate *amicus curiae*. As noted above, the Chamber brings to this Court relevant matter that was not presented by the parties. In addition, the Chamber has a unique position in the business community and is, therefore, able to show the Court that this case is critical not only to Boeing but to many American businesses. Finally, neither Boeing nor its counsel provided input or financial support for the preparation and submission of the Chamber's *amicus* brief.

Moreover, notwithstanding Roby's contentions, an *amicus* is not required to be a disinterested or impartial party. *See, e.g., Funbus Systems, Inc. v. California Public Utilities Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986). Indeed, *Ryan v. Commodity Futures Trading*

[1] As for the panel, the panel never ruled on AIA's motion, and hence, did not, as Roby contends, deny it.

Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997), a case relied on by Roby himself, acknowledges that no *amicus* brief is filed on a neutral basis, but rather, usually supports one of the litigants in the case. In this case, the Chamber has an interest in the outcome of this case because its members are exposed to enormous and often unwarranted damages by virtue of their contractual relationships. The Sixth Circuit's decision, which obfuscates the distinction between direct and consequential damages, exacerbates the Chamber's members' ability to manage those risks through the inclusion in their contracts of clauses excluding consequential damages.

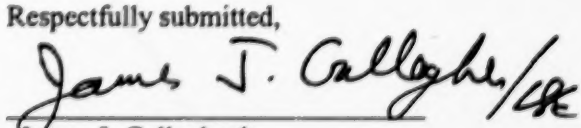
Had the Chamber not sought leave to file an *amicus* brief, Roby would likely have argued, as he did below, that the Chamber does not support Boeing's position. *See* Motion of the Chamber for Leave to File Brief as *Amicus Curiae* at 1 (*quoting* Roby's Opposition to the Motion by Aerospace Industries Association of America, Inc. for Leave to File Brief as *Amicus Curiae* in Support of Boeing's Petition for Rehearing *En Banc*). Ironically, now that the Chamber seeks to file a brief to dispel that notion, Roby tries to prevent it.

IV. CONCLUSION

Because there is no legitimate basis to object to the filing of the Chamber's brief and because the Chamber brings to the Court's attention new matter relevant to the Court's consideration of Boeing's petition, the Chamber's motion should be granted.

Dated: June 9, 2002

Respectfully submitted,



James J. Gallagher*
Herbert L. Fenster
Barbara J. Bacon
MCKENNA LONG & ALDRIDGE LLP
444 S. Flower Street, Suite 800
Los Angeles, CA 90071
(213) 688-1000
*Counsel of Record for *Amicus Curiae*

Robin S. Conrad
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337